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PETITION NOT PRINTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 762

HYMAN KALISH,

Petitioner,

vs.

HAROLD A. HOSIER, I. M. ROSENBLATT, WALLACE J. AXELSON, W. C. KING, JR., DENVER MAILERS UNION NUMBER 8 LOCAL OF THE INTERNATIONAL MAILERS UNION, AND THE INTERNATIONAL MAILERS UNION,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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I.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on August 11, 1966, and is reported in 364 F. 2d 829; it is set forth as Appendix "A" to the Petition.

The opinion of the United States District Court for the District of Colorado, was entered on December 27, 1965, is reported in 256 F. Supp. 853, and is set forth as Appendix "B" to the Petition.

II.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 11, 1966; the Petition herein was filed apparently on November 8, 1966 in typewritten form. Apparently at the time of the filing of the Petition herein, Petitioner also filed a "Motion to Dispense With Printing of Record". Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

III.

STATUTES INVOLVED.

Petitioner asserts that certain statutory provisions are involved, to-wit: Sections 101(4)(5), 102, 103, 609 and 610 of Public Law 86-257, commonly referred to as the "Labor-Management Reporting and Disclosure Act of 1959" (LMRDA), and Section 158(b)(1)(A) of the "Labor-Management Relations Act of 1947" (Taft-Hartley Act).

Section 101 (29 U. S. C. Section 411) of the LMRDA reads as follows:

> "(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> "(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organiza-

tion or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or

similar governing body shall be effective only until the next regular convention of such labor organization.

"(4) Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

"(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

"(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect." (Pub. L. 86-257, Title I, § 101, Sept. 14, 1959, 73 Stat. 522; 29 U. S. C. Section 411).

Section 102 (29 U. S. C. Section 412) of the LMRDA reads as follows:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation

of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located." (Pub. L. 86-257, Title I, § 102, Sept. 14, 1959, 73 Stat. 523; 29 U. S. C. Section 412).

Section 103 (29 U. S. C. Section 413) of the LMRDA reads as follows:

"Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." (Pub. L. 86-257, Title I, § 103, Sept. 14, 1959, 73 Stat. 523; 29 U. S. C. Section 413).

Section 609 (29 U. S. C. Section 529) of the LMRDA reads as follows:

"It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of Section 412 of this title shall be applicable in the enforcement of this section." (Pub. L. 86-257, Title VI, § 609, Sept. 14, 1959, 73 Stat. 541; 29 U. S. C. Section 529).

Section 610 (29 U. S. C. Section 530) of the LMRDA reads as follows:

"It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with

or preventing the exercise of any right to which he is entitled under the provisions of this chapter. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both." (Pub. L. 86-257, Title VI, § 610, Sept. 14, 1959, 73 Stat. 541; 29 U. S. C. Section 530).

Section 8(b)(1)(A) (29 U. S. C. Section 158(b)(1)(A)) of the Taft-Hartley Act reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * * (July 5, 1935, c. 372, Sec. 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, Sec. 101, 61 Stat. 140; 29 U. S. C. Section 158(b)(1)(A).

IV.

QUESTIONS PRESENTED.

1. Whether this Court should entertain a Petition for Certiorari on the contention of Petitioner that a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals, although there is no such conflict.

2. Whether a member of a union is entitled to a jury trial in a suit under the provisions of Section 102 of Public Law 86-257 (29 U. S. C. Section 412) of the Labor-Management Reporting and Disclosure Act of 1959.

3. Whether a member of a union is required to exhaust the internal remedies of his union prior to commencing an action under Section 101 (29 U. S. C. Section 411) of the Labor-Management Reporting and Disclosure Act of 1959.

4. Whether a labor union is free to make internal disciplinary rules, so long as the member's relation with his employer is not adversely affected.

V.

STATEMENT OF THE CASE.

Nature of the Case.

The action herein was originally commenced by Petitioner in the United States District Court for the District of Colorado on July 13, 1964.

On January 21, 1965, the District Court entered an order, which among other things, provided:

> "This matter is before the court on defendant's motion to dismiss the amended complaint. * * *.
>
> "* * *. This latest complaint fails to comply with the court's Order of October 13, 1964. Alleged violations of specific provisions of the statute should be framed in terms of specific acts of defendant's alleged misconduct. It is therefore
>
> "ORDERED that defendant's motion to dismiss be, and the same hereby is granted, and plaintiff shall have 15 days from the date of this Order to file a complaint in conformity with this Order and the court's Order of

---

No Appendix was printed as to this proceeding in the Court of Appeals, and of course, such is not now available for use by the Respondents or this Court; with the "unprinted" Record in Washington, D. C., nevertheless, when possible, every effort will be made by Respondents to refer to the *"Record"* that may be on file in the Office of the Clerk of this Court. The *Notice*, as received by Respondents, indicates that the "Complete record and both parties' briefs to the Appeals Court" were filed in this Court pursuant to Rule 21 (1); apparently at the time of the filing of the Petition herein, Petitioner also filed a "Motion To Dispense With Printing Of Record".

In view of the condition of the *Record* herein, and as a gesture of convenience to the Court, under this *Statement Of The Case*, Respondents have made an effort to present the *Nature Of The Case* and also a *Concise Statement Of The Facts.*

October 13, 1964. If plaintiff does not comply with this Order, this action will be dismissed with prejudice."

On or about the 4th day of February, 1965, Petitioner filed his *Third Amended Complaint;* the *prayer* thereof provided:

> "WHEREFORE, Plaintiff respectfully requests this Honorable Court find the Plaintiff a member in good standing of said union, and to set aside such fines, charges, and disciplines of said union which unfairly penalize Plaintiff, to order said Defendants to cease and desist from their unjust and illegal acts toward Plaintiff, to award Plaintiff Fifty-one Thousand Dollars ($51,000.00) in compensatory damages, and Fifty-Thousand Dollars ($50,000.00) in exemplary damages, and for such other and further relief as may be deemed by this Court to be equitable in the premises."

On April 14, 1965, the District Court entered an Order, which among other things, recited:

> "Plaintiff brings this action under the Bill of Rights of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411. It appears from the complaint that his troubles began in November of 1963, when he was fined $1., which he refused to pay. He was shortly thereafter deprived of the "status and rights of a member in good standing." The complaint then alleges a series of charges and countercharges between plaintiff and the defendants, which evidently culminated in his formal expulsion from the Union on June 26, 1964.
>
> * * * * *
>
> "Defendants have argued that prior to June 26, 1964, an appeal under Section 8, Article XXV of the By-Laws of the International Mailers Union was always open to plaintiff, but because he never availed himself of this administrative remedy, he therefore has failed to exhaust his remedies as required by law. Defendants further argue that despite plaintiff's filing of a notice of appeal of the June 26, 1964 action, the

appeal was never perfected as required by Section 9, Article XXV of the By-Laws.

* * * * *

"With regard to plaintiff's failure to perfect his appeal of the June 26, 1964 expulsion to the convention of August 1964, he offers only the excuse that he did not have the 60 days allowed him under Section 9 prior to the convention. The Court does not believe that such a situation affords plaintiff any alibi for his failure to appeal, for he did have 52 days prior to the convention, and that was certainly sufficient time within which to prepare an appeal."

On July 21, 1965, the District Court entered an order, which among other things, provided:

"Earlier rulings by this court have made it unmistakably clear that this is an action under the Bill of Rights of the Labor Management and Disclosure Act of 1959. It was only after plaintiff conformed the allegations of his complaint to that Act that this court conceded its jurisdiction, for the allegations of the complaint set forth no other conceivable jurisdictional basis."

On December 27, 1965, in its Memorandum Opinion And Order (256 F. Supp. 853-4), the District Court stated:

"Plaintiff brings this action under the provisions of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 401 et seq. This court has jurisdiction pursuant to 29 U.S.C. Section 412."

In their *Answer* to the *Third Amended Complaint,* Respondents generally denied Petitioner's allegations, *renewed* their Defense that the Complaint failed to state a claim on which relief could be granted, and alleged as an Affirmative Defense that Petitioner had failed to exhaust his remedies for redress afforded by the Constitution of Respondent Union.

In the pre-trial conference, the District Court entered a

pre-trial order, which was approved as to form and content by the attorneys for the parties, and such, among other things, provided:

"4. PRELIMINARY RULINGS OF THE COURT.

The Court has heretofore ruled:

* * * * *

"(c) That the plaintiff's failure to appeal to the Union's convention from the decision of the Executive Council expelling him from membership bars any claim in this Court based upon such expulsion.

* * * * *

"11. MISCELLANEOUS ORDERS.

"(a) The issue of the plaintiff's expulsion from the Union following the trial on June 24, 1964, is not a matter to be considered by the court, but evidence concerning said trial, if otherwise competent, material and relevant, may be introduced to prove other contentions of the plaintiff." (Page 4 of Appellees' Brief in Court of Appeals.)

Concise Statement of the Facts.

Petitioner came to Denver, Colorado, in approximately 1956, and became a member of Respondent local union (R. 10); at that time he went to work in the Mailing Room of the Rocky Mountain News in Denver and continued to work there until approximately 1958, at which latter date he went to work for the Denver Post (R. 10-14); while Petitioner was working at the Rocky Mountain News, he had difficulties with some of his fellow employees (R. 227); he also had difficulties with the management of the Rocky Mountain News in that he "didn't see eye to eye with the foreman on certain things" (R. 227); apparently, after he left the employment of the Rocky Mountain News, a Mr. Fletcher in the Personnel Department wrote him a letter telling him

"to stay away from the mailing room" of the Rocky Mountain News (R. 227-228).

When Petitioner came to work in the Mailing Room of the Denver Post in 1958 he didn't seem to mix with the fellows, didn't say hello or good morning, although he did speak to some of the fellows; but, he "didn't seem to mix up among the group, and we have good fellowship in the room"; after a while it was pointed out to him that he knew "practically everybody" in the Mailing Room of the Denver Post because he knew "practically everybody in the union" (R. 14). It was also pointed out to him at that time, that "this (Denver Post) is a darn good place to work and we have a good bunch of boys"; that "We (the mailers) are very friendly here. We are a virile group of men and we use loud language, but our spirit is good and we work together very well. Our comradeship is very good." That "If you (Petitioner) wish to go around without speaking to the men, they will respect it. They will leave you alone, but I think you will find you can get along with the boys if you just come in and say good morning. They are that kind of a group." To such friendly advice, Petitioner stated "I think you are right, * * *. I am just this way. I like to go this way and that sometimes" (R. 14-15).

For as long as one witness could remember, Petitioner walked around the Mailing Room "and smiled at the men and snickered at the men" (R. 375); "he has done things * * * to aggravate and to possibly get on men's nerves and so on. * * * he has worn certain badges, and so on, that would possibly aggravate men. He has gone around more or less with an expression many times on his face—well, you try to determine what his expression would mean—that possibly he felt he had things going against us (R. 255).

One witness for Petitioner testified that he had spoken to Petitioner at all times, and he had observed that some other members of the union talked to Petitioner (R. 149); that he

observed Petitioner wearing a badge or button in the mailing room while he was working, which had on it "Bad Papers" (R. 149); that witness admitted that he himself wore one of the "Bad Papers" badges on one occasion and that Petitioner gave it to him; Petitioner usually wore it when he was working around the "inserting machine" (R. 150-151); the same witness for Petitioner testified:

"Q. Did you ever notice him do anything in the mailing room in the way of gesture other than with this badge?

A. Yes, sir.

Q. What?

A. There is a little motion that I have seen him make like he had a paddle.

Q. And did you ask him about that?

A. No, I didn't ask him.

Q. Well, how many times did you see him do that?

A. I don't know, maybe a half a dozen or more.

Q. And how would he do it now?

A. Just like he was stirring something.

Q. And would he do that at any time of the day in front of the other men working, or how did he do it? Can you just tell the Court what you observed him doing like he was stirring something?

A. Usually he would be more or less directing the motion of an individual, not at the group or—but, working in a room like that, anyone can see the motion.

Q. Did he direct that at any particular individuals?

A. Well, he has at me before, yes, sir.

Q. Do you know what it meant?

A. Yes, sir.

Q. What?

A. You mean direct words?

Q. Well, if you can avoid using any profane or vulgar language, yes.

A. Well, he inferred that he was stirring I would say waste matter.

Q. That he was stirring it up, is that right?

A. That's the opinion I formed from his motions, yes, sir.

Q. In other words, it was your opinion that you formed from him going through this gesture that he was stirring up some kind of trouble, is that right?

A. I never heard him use the word "trouble".

Q. But you say stirring up waste matter, is that right?

A. Yes.

Q. He didn't use that particular term, he used some other term, is that right?

A. Yes, sir.

Q. You would rather not repeat that at this time in the room?

A. This is right." (R. 151-153.)

"Mr. Fillenwarth: That's all.

Redirect Examination by Mr. Senior.

Q. Now, Mr. Goodyear, in this friendly, virile group of men, isn't there a considerable amount of horseplay?

A. Yes, sir.

Q. The fellows like to have a laugh once in awhile, don't they?

A. Makes time pass faster." (R. 153.)

* * * * * *

"Mr. Senior: No further questions.

Recross Examination by Mr. Fillenwarth.

Q. Mr. Goodyear, could you just briefly relate to the Court some of the common acts of horseplay that have been engaged in by the mailers there in the Denver Post?

A. Well, it usually goes on on Friday night, because that's a long, hard shift, and while the comics are going down the line from the inserting machine to the tying machine it is not uncommon for a person to turn the top half of it or the whole bundle on the line so the fellow on the end will just have to take a little extra time to turn it around, and there is four people putting them on the line some of the time so he didn't know who turned it, but everybody else—

I have seen them take paste, bunches of paste on a piece of paper, and put it on the back of the bundle, and when the man puts it in the tying machine he gets a handful of paste. I have had it before.

Put wash cups on the peddle, so when you stomp on it you get water. Just various things.

Q. Have those happened to you?

A. Yes, every one.

Q. Have you perhaps engaged in instituting those items of horseplay yourself?

A. Many times." (R. 154-155.)

Thomas F. Lunney, another witness for Petitioner, testified there were about 60 men working in the Mailing Room of the Denver Post and about 20 or 25 of the men talked to Petitioner; that Petitioner "was treated the same as anybody else"; in fact, "He was treated a little better. I think they kind of stepped around him. Well, they didn't want to give him any, you know, opportunity to have a beef." (R. 160.) Petitioner never made any complaints to Witness Lunney "about the way he was being treated." That Petitioner had "Always been nervous as long as I have known him" (R. 160), and that has been some seven (7) years (R. 158).

Maynard Pearce, testified that he first met Petitioner twelve years ago and then again when Pearce came to work in Denver two years ago; on January 8, 1965, while the Witness was working with Petitioner, the latter let a skid of papers down on the foot of the Witness; the foreman "asked him (Petitioner) if he would kindly raise it, it was on my foot, and he raised it up"; "Well, at the time it seemed like it was a big joke that I wasn't hurt as bad as he thought it was hurt, and I was rolled out of there by an electric dolly to the stairway to the nurses's and was taken to the hospital and an x-ray showed that my toe was broke. I was off approximately a month (R. 359-360). "Well, when the incident happened * * * and * * * the skid was

being raised off my foot, I looked up at him and he had a kind of a sly grin on his face (R. 360); the second day after the Witness returned to work, Petitioner remarked to him: "What some people won't do to get off work" (R. 360).

Petitioner himself testified as to his *attitude,* when he was asked to attend a meeting of the Executive Committee of the Respondent local union on December 1, 1963 to discuss the matter as to the problems between him and the local union (R. 226); Petitioner stated that he did not go to the meeting because he received only an oral invitation and he "wanted a written invitation"; that he would have accepted the invitation, if they "would have put that in writing" (R. 224-227).

In other testimony, Petitioner admitted that he didn't pay the full amount of his dues in November of 1963, "because I had purposely put the union on the offensive and I figured that they would bring charges against me for not paying that there dollar fine" (R. 198); that he "was doing it the legal way" (R. 223); that all during that time, Petitioner was in continuous correspondence with a lawyer in Pennsylvania who then had litigation pending against the Respondent International Union (R. 198-199).

The evidence is clear as to the attitude of Petitioner; also, that Petitioner steadfastly refused to cooperate with the Respondent local union or its officers and representatives in their many efforts to talk and meet with Petitioner, etc.; typical of such is the testimony of Kenneth A. Fitzgerald, a fellow employee. The relationship between Petioner and Fitzgerald has been friendly (R. 312) and Petitioner testified that he trusts Fitzgerald and believes that he is a good, honest man (R. 217, 218). Concerning Petitioner's difficulties, Mr. Fitzgerald testified:

"Q. Are you acquainted with Hyman Kalish?
A. Yes, very well.

Q. Has he ever participated in this horseplay?

A. Yes, he does. He was the gentleman that continually turned the Number One press off while we were working.

Q. Has he been the target of this horseplay any more than anyone else?

A. No more than anyone else I think.

Q. How well do you know Hyman Kalish?

A. Well, I have known him. I have liked Hyman and I still like Hyman and I think our relation has been one of friends." (R. 312.)

* * * * *

"A. I talked to Hy. I asked him what he hoped to gain as a friend, because as I stated earlier I do like Mr. Kalish. I have no animosity toward him and no bitterness and, therefore, I know that at other times Rosey (Respondent Rosenblatt) and I have been together and different fellows and we went up to try to talk to him, to Kalish. I know one time we were catching the press. Three and Four, and I know that Rosey (Respondent Rosenblatt) made overtures then to Mr. Kalish, asking him if he wouldn't settle down and get off this here attitude which he maintained and try to come to some reasonable agreement with us instead of just taking the attitude of contempt for all of us at times.

Q. What was Mr. Kalish's response?

A. No answer, he would just ignore us when we would try to talk to him or if we would try to talk to him he would say, 'You haven't seen nothing yet.'" (R. 316, 317.)

Testimony in the same vein was given by other employees in the mailing room, Harry Sandler (R. 292, 294), Maynard Pearce (R. 359, 360), Richard Legge (R. 368-373), Harry Frost (R. 255), and Ted R. Schamp, the assistant foreman of the mailing room (R. 285).

At least one or two times, it has been necessary to talk to Management of the Denver Post as to Petitioner "about

the way he smells'' and Petitioner was taken to the office ''at least one time'' about the way he smells (R. 276).

Petitioner has been employed in the Mailing Room of the Denver Post since June of 1959 (R. 161); his employment and his earnings have not been adversely affected in any way since November of 1963; as a matter of fact, Petitioner has not only continued working at the Denver Post since November of 1963, the same as before, but he has made more money and worked more hours since November of 1963 (R. 200).

Since November of 1963, and recently, grievances have been processed for Petitioner by Respondent local union at the request of Petitioner and settled for him (271-273; 285); the Chapel Chairman (Shop Steward) of the Respondent local union has treated Petitioner the same as he treats all other members, such as to overtime, etc., ''no discrimination whatsoever (R. 273-274); a grievance was filed by Petitioner with the Respondent local union, was processed by the union with the foreman in the Mailing Room and the condition complained of by Petitioner was corrected (R. 285); the foreman treats Petitioner the same as other employees (R. 285-286).

Petitioner has always been treated good in the Mailing Room by his fellow employees and by the foreman (R. 275, 285-286); as to the treatment by Petitioner of his fellow employees, ''It all depends on who he is—he is always going around snubbing certain ones'' (R. 275).

The Respondent local union has a *''sick fund''* and in the spring of 1964, Petitioner filed a claim for *sick benefits* with the union, it was handled in the same manner by the Secretary of the local union as all other *''sick claims''* and paid (R. 302-305).

Section 76 of the By-Laws of Respondent local union (Plaintiff's Ex. 3) provides, among other things:

"Local dues shall be ½ of one percent of total earnings a month with one dollar ($1.00) minimum plus $1.00. The one dollar to be rebated if the member answers roll call. No excuse shall be accepted other than a doctor's certificate of the member's illness, member working in an adjacent city or a member not actively engaged in the mailing trade and living beyond a twenty-five (25) mile radius of the City of Denver * * *."

Petitioner admitted that he seldom attended union meetings, having attended only one union meeting in 1962 and only one union meeting in 1963 (R. 203-204); prior to and including October of 1963, Petitioner always paid his full monthly dues including the one dollar, without protest or otherwise, even though he did not attend the local union meetings (R. 194).

On November 8, 1963, Petitioner refused to pay the one dollar (that would have been rebated to him if he attended the local union meeting) on the ground that it was "an illegal fine" (Plaintiff's Ex. 8; R. 195); Petitioner was told by the President of the local union that he should pay the one dollar "* * * under protest and then appeal through the normal channels of the Union" (R. 38); Petitioner replied, "No, I know what I am doing and I am going to do it my way" (R. 38).

Petitioner was acquainted with the procedures for appeal contained in the union's constitution and by-laws (R. 197); however, on November 8, 1963, when Petitioner paid his dues, he deducted the $1.00 therefrom, and did not receive a monthly "Working Card"; he knew he could have appealed that action, that is, for not receiving his "Card", but he did not appeal; Petitioner did not receive his "Working Card" in December, 1963, "or any month thereafter," and he did not appeal from any of such actions (R. 195-198); Petitioner admitted he did not follow the appeal pro-

cedure "because I had purposely put the union on the offensive and I figured that they would bring charges against me for not paying that there dollar fine" (R. 198).

By reason of the failure of Petitioner to pay his monthly dues as required by Section 76 of the By-Laws of the Respondent local union, in the latter part of November of 1963, the President of the local union advised Petitioner that he was not in good standing (R. 63, 385); Petitioner did not appeal from this ruling (R. 196, 197, 391).

No further action was taken concerning Petitioner until April 9, 1964, when the Executive Committee of the Respondent local union filed written "charges" against him (R. 113); the entire matter was referred to the Executive Council of the Respondent, International Mailers Union (R. 114); on April 23, 1964, Respondent Harold A. Hosier, President of Respondent International Mailers Union, notified Petitioner that the Executive Council of Respondent International Mailers Union had taken original jurisdiction of the "charges" against Petitioner (Third Amended Complaint, rhetorical paragraph XV; Answer to Third Amended Complaint, rhetorical paragraph 15 of Second Defense); on May 27, 1964, said Respondent Hosier forwarded to Petitioner a copy of the "charges" which had been preferred against him (Third Amended Complaint, XVI; Answer, 16 of Second Defense); on June 24, 1964, a hearing was conducted in Denver, Colorado, by the Executive Council of Respondent International Mailers Union, of which Petitioner had been previously notified, and at which hearing Petitioner appeared and participated (Plaintiff's Ex. 4); a stenographic transcript of the entire proceeding before the Executive Council was prepared by a certified shorthand reporter and Petitioner received a copy thereof at his own expense (R. 178), and such transcript was introduced in evidence as Plaintiff's Exhibit 4; on June 26, 1964, Petitioner was notified in writing of the action of the Execu-

tive Council of Respondent International Union in expelling him from the union (Plaintiff's Ex. 53).

Under date of July 2, 1964, Petitioner sent the following communication (Plaintiff's Ex. 54) to the president of Respondent International Union:

> "This is a notice that I appeal the action taken against me by the I. M. U. Executive Council on June 24, 1964, —and all other actions and penalties against me.".

On July 13, 1964, Petitioner instituted this action in the District Court.

Thereafter, a Convention of the Respondent International Union was held on August 17, 18 and 19, 1964. Petitioner's appeal was referred to the Convention's Appeals Committee. The Appeals Committee reported to the Convention that Petitioner had failed to submit any material in support of his appeal and therefore recommended that the appeal be denied. The report of the Appeals Committee was adopted by the Convention on August 19, 1964, was introduced in evidence as Defendants' Exhibit A, and reads in part, as follows:

> "Upon receiving and examining said 'Notice of Appeal', your Appeals Committee thereupon and thereafter periodically contacted the Secretary-Treasurer of the I. M. U. and also Harold A. Hosier, President of the I. M. U., to ascertain if either of them or the I. M. U. or this Convention had received any other papers, documents, briefs, or appeal papers from Hyman Kalish to support or supplement his 'Notice of Appeal' but the response has been in the negative in each instance.
>
> "Your Appeals Committee has waited until the last day of this Convention to make its report, in an effort to extend to Hyman Kalish every opportunity to present his appeal, although technically speaking, the time for presentation of his appeal papers expired on August 17, 1964, as per a specific section of Article XXV of the By-Laws of the I. M. U.; however, no

appeal papers whatsoever have been received, except the foregoing 'Notice of Appeal'.

"Since the said 'Notice of Appeal' of Hyman Kalish to this Convention has not been properly supplemented by the filing of his appeal papers, with the Secretary-Treasurer of the I. M. U. and this Convention, all pursuant to the laws of the I. M. U., your Appeals Committee respectfully regrets to report and necessarily recommends that the said appeal of Hyman Kalish to this Convention be dismissed and denied."

VI.

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals in the case at bar is not in conflict with the decision in the case of *Simmons v. Avisco, Local 713, Textile Workers Union of America* (C. A. 4, 1965), 350 F. 2d 1012.

Petitioner was not entitled to a jury trial in his claim for reinstatement as a member in the union and for damages under Section 101 (29 U. S. C. Section 411) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), as such claim was a statutory proceeding, unknown to the common law; it was essentially an equity proceeding for reinstatement as a member, with a recovery for money damages being merely an incident to such relief.

Petitioner was required to exhaust the internal remedies of his union prior to commencing his action in the District Court as provided in the LMRDA, and failing to do so, he had no standing in court.

A labor union is expressly permitted under the LMRDA to make internal disciplinary rules as to the members thereof.

VII.

ARGUMENT.

1.

Whether This Court Should Entertain a Petition for Certiorari on the Contention of Petitioner That a Court of Appeals Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals, Although There Is No Such Conflict.

At the top of page 3 of the Petition herein, Petitioner states, as a reason for granting the writ, *but in an obviously hesitant manner,* that "The *decisions* of the Court below in the instant case appear to be in conflict with the decision" of *Simmons* v. *Avisco, Local 713, Textile Workers Union of America* (C. A. 4, 1965), 350 F. 2d 1012.

The *decisions* of the District Court (256 F. Supp. 853), and the *decision* of the Court of Appeals (364 F. 2d 829), are not in conflict with the case of *Simmons, supra.*

Petitioner *very generally* contends (1) that he was not required to exhaust the internal remedies available to him in the union if such remedies required more than four months time, (2) that the union was not permitted to make internal disciplinary rules with respect to its members, and (3) that he was entitled to a jury trial.

Section 76 of the *By-Laws* of Respondent local union (Plaintiff's Ex. 3) provides, among other things:

> "Local dues shall be ½ of one percent of total earnings a month with one dollar ($1.00) minimum plus $1.00. The one dollar to be rebated if the member answers roll call. No excuse shall be accepted other than a doctor's certificate of the member's illness, member working in

an adjacent city or a member not actively engaged in the mailing trade and living beyond a twenty-five (25) mile radius of the City of Denver * * *."

Petitioner admitted that he seldom attended union meetings, having attended *only* one union meeting in 1962, and *only* one union meeting in 1963 (R. 203-204); prior to and including October of 1963, Petitioner always paid his full monthly dues including the $1.00, without protest or otherwise, even though he did not attend the local union meetings (R. 194).

On November 8, 1963, Petitioner refused to pay the $1.00 (that would have been rebated to him if he attended the local union meeting) on the ground that it was "an illegal fine" (Plaintiff's Ex. 8; R. 195); Petitioner was told by the President of the local union that he should pay the $1.00 "* * * under protest and then appeal through the normal channels of the Union" (R. 38); Petitioner replied, "No, I know what I am doing and I am going to do it my way" (R. 38).

Petitioner was acquainted with the procedures for appeal contained in the union's *constitution* and *by-laws* (R. 197); however, on November 8, 1963, when Petitioner paid his dues, he deducted the $1.00 therefrom, and did not receive a monthly "Working Card"; he knew he could have appealed that action, that is, for not receiving his "Card", but he did not appeal; Petitioner did not receive his "Working Card" in December, 1963, "or any month thereafter," and he did not appeal from any of such actions (R. 195-198); Petitioner admitted he did not follow the appeal procedure "because I had purposely put the union on the offensive and I figured that they would bring charges against me for not paying that there dollar fine" (R. 198).

By reason of the failure of Petitioner to pay his monthly dues as required by Section 76 of the *By-Laws* of the Re-

spondent local union, in the latter part of November of 1963, the President of the local union advised Petitioner that he was not in good standing (R. 63, 385); Petitioner did not appeal from this ruling (R. 196, 197, 391).

No further action was taken concerning Petitioner until April 9, 1964, when the Executive Committee of the Respondent local union filed written "charges" against him (R. 113); the entire matter was referred to the Executive Council of the Respondent, International Mailers Union (R. 114); on April 23, 1964, Respondent Harold A. Hosier, President of Respondent International Mailers Union, notified Petitioner that the Executive Council of Respondent International Mailers Union had taken original jurisdiction of the "charges" against Petitioner (Third Amended Complaint, rhetorical paragraph XV; Answer to Third Amended Complaint, rhetorical paragraph 15 of Second Defense); on May 27, 1964, said Respondent Hosier forwarded to Petitioner a copy of the "charges" which had been preferred against him (Third Amended Complaint, XVI; Answer, 16 of Second Defense); on June 24, 1964, a hearing was conducted in Denver, Colorado, by the Executive Council of Respondent International Mailers Union, of which Petitioner had been previously and properly notified, and at which hearing Petitioner appeared and participated (Plaintiff's Ex. 4); a stenographic transcript of the entire proceeding before the Executive Council was prepared by a certified shorthand reporter, and Petitioner received a copy thereof at his own expense (R. 178); and, such transcript was introduced in evidence as Plaintiff's Exhibit 4; on June 26, 1964, Petitioner was notified in writing of the action of the Executive Council of Respondent International Union in expelling him from the union (Plaintiff's Ex. 53).

Under date of July 2, 1964, Petitioner sent the following *Notice of Appeal* (Plaintiff's Ex. 54) to the president of Respondent International Union:

> "This is a notice that I appeal the action taken against me by the I. M. U. Executive Council on June 24, 1964, —and all other actions and penalties against me."

On July 13, 1964, *Petitioner instituted this action* in the District Court, just twenty (20) days after the decision, under which he was expelled from the union.

Thereafter, a Convention of the Respondent International Union was held on August 17, 18 and 19, 1964. Petitioner's *Notice of Appeal* was referred to the Appeals Committee of that Convention. The Appeals Committee reported to the Convention on the last day thereof, that Petitioner had failed to submit any material in support of his *Notice of Appeal,* and therefore recommended that the appeal be denied. The report of the Appeals Committee was adopted by the Convention on August 19, 1964, and was introduced in evidence as Defendants' Exhibit A.

On April 14, 1965, the District Court in the case at bar ruled that:

> "Plaintiff brings this action under the Bill of Rights of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. Sec. 411. * * *.
>
> "Defendants have argued that prior to June 26, 1964, an appeal under Section 8, Article XXV of the By-Laws of the International Mailers Union was always open to plaintiff, but because he never availed himself of this administrative remedy, he therefore has failed to exhaust his remedies as required by law. Defendants further argue that despite plaintiff's filing of a notice of appeal of the June 26, 1964 action, the appeal was never perfected as required by Section 9, Article XXV of the By-Laws.
>
> • • • • •
>
> "With regard to plaintiff's failure to perfect his appeal of the June 26, 1964 expulsion to the convention of August 1964, he offers only the excuse that he did not have the 60 days allowed him under Section 9 prior to

the convention. The Court does not believe that such a situation affords plaintiff any alibi for his failure to appeal, for he did have 52 days prior to the convention, and that was certainly sufficient time within which to prepare an appeal."

In the pre-trial conference, the District Court entered a pre-trial order, which was approved as to form and content by the attorneys for the parties, and such, among other things, provided:

"4. PRELIMINARY RULINGS OF THE COURT.

"The Court has heretofore ruled:

* * * * *

"(c) That the plaintiff's failure to appeal to the Union's convention from the decision of the Executive Council expelling him from membership bars any claim in this Court based upon such expulsion.

* * * * *

"11. MISCELLANEOUS ORDERS.

"(a) The issue of the plaintiff's expulsion from the Union following the trial on June 24, 1964, is not a matter to be considered by the court, but evidence concerning said trial, if otherwise competent, material and relevant, may be introduced to prove other contentions of the plaintiff." (Page 4 of Appellees' Brief in Court of Appeals.)

Then, on July 21, 1965, the District Court entered an order, which among other things, provided:

"This matter is before the Court on plaintiff's demand for a jury trial * * *.

* * * * *

"Earlier rulings by this Court have made it unmistakably clear that this is an action under the Bill of Rights of the Labor Management Reporting and Disclosure Act of 1959. *It was only after plaintiff conformed the allegations of his complaint to that Act that this Court conceded its jurisdiction, for the allega-*

tions of the complaint set forth no other conceivable jurisdictional basis.

"With the statutory nature of this action in mind, we deny defendants' motion to dismiss and consider plaintiff's demand for a jury trial. Inasmuch as this is a purely statutory proceeding, and the statute makes no provision for trial by jury, we cannot find that plaintiff has a right to a jury trial. We agree with the holding in *McCraw* v. *Assoc. of Journeymen*, 341 F. 2d 705 (6th Cir. 1965), wherein the court denied the right to jury trial under the same section of this same statute. * * *" (Emphasis added).

In its *Memorandum Opinion And Order* of December 27, 1965 (256 F. Supp. 853), the District Court stated the law, at the bottom of page 855 and at the top of 856, as follows:

"The LMRDA provides for the protection of union members in their relationship with the union. In enacting section 411, Congress provided for a union member's 'Bill of Rights'; but also recognized the need of a union, as an organization, to provide for and enforce reasonable rules and regulations to insure the union's effectiveness, both internally and in its relationship with management. The legislative policy appears in the proviso to section 411, which states

> '* * * nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution * * *. 29 U. S. C. Section 411 (a) (2)'

and also appears in a proviso to section 158 (b) (1) of the Taft-Hartley Act. There, in providing that a labor organization shall not restrain or coerce an employee in the exercise of his rights otherwise guaranteed by the National Labor Relations Act, Congress nevertheless specifically provided that a union shall have the right

> '* * * to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.'"

In the instant case (C. A. 10, 1966) 364 F. 2d 829, 830, the Court of Appeals very succinctly enunciated the same principles and decisions in its opinion, as had been pronounced below by the District Court in this proceeding (256 F. Supp. 853), which Court of Appeals *decision in toto,* reads as follows:

> "Issues, a decision of which will be dispositive and determinative of this appeal, were considered and decided adversely to Kalish by the trial court below in an exhaustive and well reasoned opinion, *Kalish* v. *Hosier, et al.,* D. C. Colo., 256 F. Supp. 853. Being in full accord therewith, we adopt it as the opinion of this court and affirm the judgment."

In *Simmons, supra,* the *same identical principles of law* were expounded (1) as to the protection of union members in their relationship with a union and the right of labor unions to adopt and enforce rules and regulations concerning the responsibility of every member toward the union as an institution, and (2) as to the long established tenet requiring a union member to exhaust internal remedies before commencing suit.

In *Simmons* (350 F. 2d 1012) at page 1016, the Court of Appeals for the Fourth Circuit stated:

> "The jurisdiction of federal courts in suits brought under section 102 for violations of the LMRDA's Bill of Rights is defined by Section 101 (a) (4). See *Parks* v. *International Brotherhood of Electrical Workers,* 314 F. 2d 886, 925 (4th Cir.), cert. denied, 372 U. S. 976, 83 S. Ct. 1111, 10 L. Ed. 2d 142 (1963).
>
> This section reads:
>
> '"No labor organization shall limit the right of any member thereof to institute an action in any court * * * *Provided,* That any such member may be required to exhaust reasonable hearing procedures (*but not to exceed a four-month lapse of time*) within such organization, before instituting legal or administrative proceedings against such organizations * * *."

"The proviso was designed to further LMRDA's purpose of achieving union democracy by giving unions a reasonable opportunity to correct abuses and by encouraging them to set up machinery for the prompt and fair disposition and review of disputes. The Act therefore authorizes the federal courts to follow the common law practice of requiring a union member to exhaust internal union remedies before bringing suit.

"As previously noted, the constitution of the international union and the by-laws of the local union provide procedures for the hearing of disciplinary charges by the local union's executive board as well as for review of these proceedings by both the international union's executive council and convention. The statute, however, does not make the exhaustion of hearing procedures mandatory in all cases, but allows the courts in their discretion to determine whether pursuit of such remedies is required. *Detroy* v. *American Guild of Variety Artists,* 286 F. 2d 75, 78-79 (2d Cir. 1961)."

And, with respect to the matter of a jury trial, in the *Simmons* case, *supra,* at page 1017, the court stated:

"The union next argues that the District Court erred in permitting the case to be tried to a jury, and relies heavily on the recent case of *McCraw* v. *United Ass'n of Journeymen & App. of Plumbing, Etc.,* 341 F. 2d 705 (6th Cir. 1965), which held that in suits brought under section 102 of the LMRDA there is no right to jury trial. We sustain the District Court's ruling that the objection to jury trial came too late, for the point was not raised either by pre-trial motion or in the course of the trial, but later in a motion for judgment *n. o. v.* or new trial."

The court in *Simmons, supra,* did proceed *arguendo* to discuss the opinion in the case of *McCraw* v. *United Association Of Journeymen And Apprentices Of The Plumbing And Pipe Fitting Industry, etc.* (C. A. 6, 1965), 341 F. 2d 705, but all of such discussion was *pure obiter dictum;* in

Simmons, the Court of Appeals affirmed the judgment of the District Court definitely *on the ground* that the union's objection to the jury trial was *untimely, i. e.,* that *the objection came too late.* Such settled the issue, and any other expression by the court in *Simmons,* was as heretofore stated, *pure obiter dictum.*

The principles with respect to *obiter dicta* have long been established in the law; for example, in the case of *Cohens* v. *Virginia,* 6 Wheat 264, 399, 400; 5 L. Ed. 257, 290, Chief Justice Marshall tersely expressed such tenets, as follows:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of *Marbury* v. *Madison.*
>
> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The same established principles with respect to *obiter dicta* are set forth in *Great Northern Railway Company* v. *United States of America,* (1942) 315 U. S. 262, 279; 86 L. Ed. 836, 845; *Noel* v. *Olds,* (C. A. D. of C., 1943) 138 F. 2d 581, 586; cert. den. (1944) 321 U. S. 773; 88 L. Ed. 1067; *Milando* v. *Perrone* (C. A. 2, 1946) 157 F. 2d 1002, 1004; *United States* v. *Zuskar* (*Budzileni*) (C. A. 7, 1956) 237 F. 2d 528, 532; cert. den. (1957) 352 U. S. 1004; 1 L. Ed. 2d 549; 77 S. Ct. 564; *Capella* v. *Zurich General Accident*

Liability Insurance Co., et al. (C. A. 5, 1952) 194 F. 2d 558, 559.

Thus it can be readily noted and concluded, there is no conflict (a) between the *decisions* of the District Court herein (256 F. Supp. 853), and the *decision* of the Court of Appeals herein (364 F. 2d 829), and (b) the *decision* in the *Simmons* case, *supra,* (350 F. 2d 1012), upon which Petitioner relied in the District Court and in the Court of Appeals.

2.

Whether a Member of a Union Is Entitled to a Jury Trial in a Suit Under the Provisions of Section 102 of Public Law 86-257 (29 U. S. C. Section 412) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Respondents incorporate hereunder, the preceding portion of their Argument in answer to the above *Question,* and in support of the ruling of the District Court and the opinion of the Court of Appeals, that Petitioner was not entitled to a jury trial.

As heretofore noted, on July 21, 1965, the District Court entered an order, which among other things, provided:

> "Earlier rulings by this Court have made it unmistakably clear that this is an action under the Bill of Rights of the Labor Management Reporting and Disclosure Act of 1959. *It was only after plaintiff conformed the allegations of his complaint to that Act that this Court conceded its jurisdiction, for the allegations of the complaint set forth no other conceivable jurisdictional basis.*
>
> "With the statutory nature of this action in mind, we deny defendants' motion to dismiss and consider plaintiff's demand for a jury trial. Inasmuch as this is a purely statutory proceeding, and the statute makes no provision for trial by jury, we cannot find that

plaintiff has a right to a jury trial. We agree with the holding in *McCraw* v. *Assoc. of Journeymen*, 341 F. 2d 705 (6th Cir. 1965), wherein the court denied the right to jury trial under the same section of this same statute. * * *." (Emphasis added.)

In the case of *McCraw* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry* (C. A. 6, 1965), 341 F. 2d 705, 707, 709, the Court of Appeals stated:

"* * * McCraw filed this action in the District Court for injunctive and other relief under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, Section 412, Title 29 United States Code, usually referred to as the Landrum-Griffin Act. The amended complaint charges that the defendants, * * * wrongfully fined and suspended, in violation of Section 101 of the Act, Section 411, Title 29 United States Code. *The action sought reinstatement as a member of the union and damages.* * * *

* * * * *

"McCraw contends (1) that the District Judge erred in denying him a trial by jury, * * *.

"With respect to trial by jury, McCraw argues that his claim for damages was a claim recognized at common law, *and if he was entitled to such damages* it was equivalent to a money judgment and that the denial of a trial by jury contravened the Seventh Amendment of the United States Constitution. * * *.

"Briefly stated, the rule appears to be as follows. The amendment preserves the right which existed under the common law when the amendment was adopted. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657, 55 S. Ct. 890, 79 L. Ed. 1636; *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95, 98-99, C. A. 6th, cert. denied, *Welch* v. *United States ex rel. and for Use of T. V. A.*, 309 U. S. 688, 60 S. Ct. 889, 84 L. Ed. 1030. *Thus, it has no application to cases where recovery of money damages is an incident to an action seeking equitable relief, even though damages might have been*

recovered in an action at law. It does not apply where the proceeding is not in the nature of a suit at common law. The present case is not a suit at common law or in the nature of such a suit. It is a statutory proceeding, unknown to the common law. Guthrie National Bank v. *City of Guthrie*, 173 U. S. 528, 537, 19 S. Ct. 513, 43 L. Ed. 796. *It is essentially an equity proceeding for reinstatement as a member of the Local Union, with the recovery of money damages being merely an incident to such relief. It may be that McCraw has a separate common law action for damages for the injury to his thumb in addition to his alleged cause of action under the statute, in the trial of which he would be entitled to a jury. But no such separate cause of action is alleged by the amended complaint, in which the prayer for relief is based solely upon the alleged violation of the Labor-Management Reporting and Disclosure Act of 1959. In our opinion, McCraw was not entitled to a trial by Jury. N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, 57 S. Ct. 615, 81 L. Ed. 893; *United States* v. *State of Louisiana*, 339 U. S. 699, 70 S. Ct. 914, 94 L. Ed. 1216, rehearing denied, 340 U. S. 856, 71 S. Ct. 75, 95 L. Ed. 627; 340 U. S. 907, 71 S. Ct. 276, 95 L. Ed. 656. See: 340 U. S. 899, 71 S. Ct. 275, 95 L. Ed. 651; rehearing denied, 340 U. S. 939, 71 S. Ct. 480, 95 L. Ed. 678; Modification of decree denied, 350 U. S. 812, 76 S. Ct. 43, 100 L. Ed. 728; *Welch* v. *Tennessee Valley Authority, supra*, 108 F. 2d 95, 98-99, C. A. 6th, cert. denied, *Welch* v. *United States ex rel. and for Use of T. V. A.*, 309 U. S. 688, 60 S. Ct. 889, 84 L. Ed. 1030; *Simmons* v. *United States*, 29 F. Supp. 285, 286-287, W. D. Ky.; *Brady* v. *Trans World Airlines, Inc.*, 196 F. Supp. 504, 507, D. C. Del.; *Conrocode* v. *Ohio Bell Telephone Co.*, 11 F. R. D. 303, N. D. Ohio." (Emphasis added.)

In the *McCraw* case, *supra*, the learned judges of the Sixth Circuit have very decisively and definitely concluded for the substantial reasons set forth therein, that "In our opinion, McCraw was not entitled to a trial by jury." (341 F. 2d 705, 709.)

For the same decisive and definite reasons, Petitioner "herein was not entitled to a trial by jury."

Aside from all of the above, it should be noted *arguendo,* that in the instant case, the learned District Judge, the Honorable Alfred A. Arraj, found, among other things, the following:

> "* * *. The additional $1.00 to be rebated was a form of inducement to encourage members to attend the monthly meetings. * * *. Plaintiff's action did not affect his employment relation or his right to attend and be heard in union meetings. (256 F. Supp. 853, 854, 855.)
>
> * * * * *
>
> "The evidence established that the plaintiff's own conduct detracted from the good faith that he allegedly held throughout the entire time. His consistent refusal to cooperate with the officers in respect to the alleged illegal fine shows that he was more desirous of 'setting up the union and its officers for a law suit' rather than effecting a settlement of the dispute that would be beneficial to both sides. It also appears from the evidence that, rather than being silenced in voicing his views concerning local union activities, plaintiff rejected every opportunity accorded him whereby he could make his voice heard. * * *. (256 F. Supp. 853, 855.)
>
> * * * * *
>
> "* * * at no time was the plaintiff's status as an employee placed in jeopardy. * * *. (256 F. Supp. 853, 856.)
>
> "In reference to the plaintiff's contention that the defendants formed a conspiracy to harass, punish, discourage, and vilify him, the evidence adduced at trial wholly failed to support such a position. It is true that some of the incidents referred to were visited upon plaintiff. But that they were all part of a conspiracy formed against the plaintiff would be a conclusion based solely on conjecture and surmise. * * * It would be pure speculation for this Court to say that

there was a conspiracy formed by these defendants for the purpose of discrediting the plaintiff and denying him his rights guaranteed by the LMRDA. The record is devoid of any showing of concerted activities by these defendants to injure the plaintiff. * * *. (256 F. Supp. 853, 856, 857.)

* * * * *

"* * *. Having determined that the injuries complained of by the plaintiff were not the product of conspiratorial acts of the defendants, the LMRDA is insufficient to confer jurisdiction over this controversy. * * *." (256 F. Supp. 853, 857.)

Thus, the trial court herein unmistakably and positively found that Petitioner had sustained no violation of his rights under the LMRDA; therefore, he could not have sustained any damages under the LMRDA, and neither was he entitled to any damages. Accordingly, and *arguendo*, if there had been a jury trial, there would have been nothing for the jury to determine, and the trial court necessarily would have been required to direct a verdict in favor of the Respondents.

In the case of *Farr Co.* v. *Union Pacific Railroad Co.* (C. A. 6, 1939), 106 F. 2d 437, 439, the Court of Appeals held, as follows:

"The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. * * *."

Petitioner's claim for reinstatement to membership in the union was clearly equitable in nature for the trial court alone to decide; see *International Association of Machinists* v. *Gonzales* (1958), 356 U. S. 617, 621; 2 L. Ed. 2d 1018, 1022; 78 S. Ct. 923; *Local 100 of the United Association of Journeymen and Apprentices* v. *Borden* (1963), 373

U. S. 690; 10 L. Ed. 2d 638; 83 S. Ct. 1423; in determining whether or not Petitioner was entitled to reinstatement, it was, of course, necessary for the trial court herein to find and decide whether Petitioner had been deprived of his membership in the union in violation of his rights under the LMRDA. *The trial court found and decided that he had not.*

Therefore, and *a fortiori,* there was no issue of damages to be decided. It follows that the denial by the trial court of Petitioner's demand for a jury trial did not affect his substantial rights, and, under the Judicial Code, 28 U. S. C. Section 2111, the error, if any, was indeed harmless. With respect to such, in the case of *Monroe Auto Equipment Company* v. *Heckethorn Manufacturing Company* (C. A. 6, 1964), 332 F. 2d 406, 412, the Court of Appeals stated:

> "The prevailing, and we think the more logical view, is that denial of a jury trial is not reversible error if the court could have directed a verdict, and there was no evidence to go to the jury. * * *."

3.

Whether a Member of a Union Is Required to Exhaust the Internal Remedies of His Union Prior to Commencing an Action Under Section 101 (29 U. S. C. Section 411) of the Labor-Management Reporting and Disclosure Act of 1959.

Respondents incorporate hereunder, the preceding portions of its Argument under 1 and 2 above.

4.

Whether a Labor Union Is Free to Make Internal Disciplinary Rules, So Long as the Member's Relation With His Employer Is Not Adversely Affected.

Respondents, again for the sake of brevity, respectfully incorporate hereunder, the preceding portions of its Argument under 1 and 2 above, and cite as an applicable dispositive decision on this question, the case of *McCraw* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry* (C. A. 6, 1965), 341 F. 2d 705.

VIII.

CONCLUSION.

For the reasons stated above, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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